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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 02-201
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations	)	RM-9027
(Anniston and Ashland, **AL,** College Park,	)	RM-9268
Covington, and Milledgeville. Georgia)	)	RM-9384

To: The Commission

FOURTH MOTION FOR LEAVE TO FILE SUPPLEMENT

PRESTON W. SMALL
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December 13.2002

Preston W. Small (Mr. Small), by his attorney, hereby seeks leave to provide the Commission with a copy of the U.S. District Court's decision denying a motion for preliminary injunction against Mr. Small in a contract case which served as the basis of the illegal threats of severe civil liability made against Mr. Small earlier this year if he continued to participate in the instant case and to submit additional information concerning WNNX LICO, Inc.'s (WNNX) role in the making of civil threats against Mr. Small. In support whereof, the following is respectfully submitted:

1) Section D of Mr. Small's September 3, 2002 *Petition for Reconsideration* reported that Mr. Small had been threatened with a civil suit if he continued to assert his litigation rights before the Commission in the instant proceeding. Mr. Small's September 3, 2002 *Motion for Leave to Supplement Petition for Reconsideration* provides the Commission with information that Mr. Small was, in fact, served with a civil summons designed to prevent him from participating in this proceeding and states that because "Bridge's civil suit is frivolous on its face, Bridge's civil action is retaliatory and was filed to harass Mr. Small in an effort to dissuade him from presenting infomation to the Commission." September 3, 2002 *Motionfor Leave io Supplement Petition for Reconsideration*, ¶ 3.

2) Attached hereto is a copy of the November 26, 2002 ***Order*** of the U.S. District Court for the Middle District of Georgia, Athens Division, in Civil Action 3:02-CV-80 (HL) which denies preliminary injunctive relief to Bridge Capital Investors, the nominal plaintiff. **As** discussed below, the ***Order*** effectively denies relief to WNNX LICO, Inc., and its parent company, and Susquehanna Radio Corp., unnamed but moving forces behind the filing ofthe retaliatory civil suit. The District Court's *Order* provides a history ofthe subject ofthe suit, beginning with Mr. Small's first attempt

to move his station in early 1990 through a rulemaking proposal which, it was later learned, conflicted with Mr. Thomas P. Gammon's at that time unfiled plan to relocate Station WHMA(FM) from Anniston to the Atlanta area. ***Order,*** at 1-2

3) It is the 1990 Agreement between Mr. Small and Mr. Gammon, and Mr. Gammon's companies, which was the subject of the threats of severe civil liability made by Mr. Gammon, Bridge Capital Investors, WNNX, and Susquehanna Radio Corp. against Mr. Small earlier this year. Bridge Capital Investors, the nominal plaintiff, not only filed suit, it sought a preliminary ruling from court which would havc required Mr. Small to withdraw from the instant proceeding prior to a trial on the merits of the frivolously asserted contract claim.

4) The court rejected Bridge Capital Investors' request for preliminary injunctive relief on several grounds. The court determined that it

> is not willing to enter an order, at the preliminary injunction stage, that would bar Mr. Small from engaging in the exact conduct that he has been actively and openly engaging in for the last five years. Considering that Mr. Small only has a limited window of time to file objections to an FCC order, *see* 47 C.F.R. § 1.106(f) . . ., to stop Mr. Small from filing objections would result in Mr. Small losing his right to petition for reconsideration of the order with the FCC, as well as his right to appeal the FCC's ultimate decision with the court of appeals.

Order, at 12. The Court found that Bridge Capital Investors sat on whatever rights it might have had and that its tardily filed mtion for preliminary injunctive relief is barred by the doctrine of laches. *Order,* at 17-18

5) The court also found that the facts of the case filed against Mr. Small failed to demonstrate that plaintiff had a substantial likelihood of success on the merits. First, the Court found, based upon a November 1, 2002, letter Bridge Capital Investors' attorney filed with the Court. that Bridge Capital Investors "repeatedly denied Mr. Small's requests for payment in 1994,

four times in 1997, and in 2000" even though plaintiff "admits Mr. Small had a basis for claiming the $1 million . . ." and even though, at least by 1997, events had transpired "entitling Mr. Small to payment of $1 million." ***Order,*** at 17.

6) Second, the Court found that record in the case shows that in 1994 Mr. Gammon advised the undersigned in 1994 that he was not going to honor his 1990 agreement with Mr. Small. ***Order,*** at 19. Once again, the evidence shows that it is Plaintiff which first breached the contract with Mr. Small, not vice versa.

7) Third, the Court found that Bridge Capital Investors' own FCC attorney, Mr. Alan Moskowitz, in a sworn declaration filed against Mr. Small before this Commission in File No. BALH-961223GI, openly testified that the 1990 agreement "could be interpreted to have expired." ***Order,*** at 19. While not explicitly stated in the Court's order, it is certainly frivolous for the suit to have been filed against Mr. Small based upon a contract which the plaintiff itself considers to have expired.

8) With the forgoing in mind, a reasonable inference to be drawn from the Court's ***Order*** as applied to the Commission's prohibition against making threats of civil liability, it is certainly clear that the "merits" of the case filed against Mr. Small were not so clear so as to justify Mr. Gammon, Bridge Capital Investors, WNNX, and Susquehanna Radio Corp.'s threats to Mr. Small earlier this year of severe civil liability which threats were intended to deter Mr. Small from pursuing his rights before the Commission.[1] The record is uncontradicted that Mr. Gammon made

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[1] For the Commission's information, approximately one **week** prior to the release of the Court's November 26, 2002 ***Order,*** Mr. Small filed several counter claims against Bridge Capital Investors including a breach of contract claim and a fraudulent inducement into a contract claim and Mr. Small seeks damages which likely ranges between $1.5 million and $40 million depending upon (continued...)

the threats of civil action regardless of the merits of the civil claim because Bridge Capital Investors considered that it had no other option to try to obtain a $1 0-$20 million payment from WNNX/Susquelianna.

9) It is recalled that WNNX/Susquehanna's counsel "unequivocally" denied any involvement in the making of the threats or in the filing of the suit against Mr. Small. WNNX's November 8, 2002 *Consolidated Opposition*, ¶¶ 6-7. Opposing counsel clearly states that

> WNNX states unequivocally that it is not a party to or authorized any threats against Mr. Small. . . . Mr. Small's accusations are irresponsible, inflammatory, libelous and an act of desperation.. .. **WNNX's counsel has played no role io any legal proceedings involving Small other to act as WNNX's counsel in this proceeding,** and . . , neither WNNX nor WNNX's counsel has any information about the civil action other than what is in the public record.

Id. (italics by WNNX, bold by Mr. Small). The ***Order*** demonstrates that WNNX's claim of innocence is completely false. The Court found that "on April 30, 1997, Plaintiff [Bridge Capital Investors] and Susquehanna filed a petition for reconsideration with the FCC in which they contended that Scotts Trail Radio's filings constituted a 'blatant violation' of the Small Agreement

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[1](...continued)
the measure of damages utilized in the award and depending upon the current value of the station which Mr. gave up in 1990. Thus, while the Court denies Mr. Small's motion to dismiss, ***Order,*** at 8-11, Mr. Small had already determined that continuing to defend himself in the Federal courthouse was the appropriate course of action and Mr. Small's counter suit provided the jurisdictional amount which Mr. Small had previously argued was missing from the case even if the Court had accepted Mr. Small's lack of jurisdictional amount in controversy argument. For the Commission's further information, because the 1990 contract is a conditional one with each side promising to do something in return for the other side's promise to do something, when the other side breached the contract first by failing to do as promised, Mr. Small was released any obligation he might have had under the contract while also permitting him to sue for damages. Not addressed in the ***Order,*** presumably because it was not necessary to do so *to* deny the motion for preliminary injunction, is the fact that Mr. Small's covenant not to compete was limited to six years in the I990 agreement and that Mr. Small waited for more than six years until he acted even after the other side breached, Moreover, under Georgia law in which the contract is interpreted, covenants not to compete are generally considered unreasonable and unenforceable if the length of debarment is over five years.

that triggered a civil action for specific performance and damages." *Order*, at 20; *see also Order*, at 16. The FCC proceeding lo which the Court refers is File No. BALH-961223GI in which Mr. Small attempted to sell to a third party the very radio station at issue in the instant proceeding and WNNX/Susquehanna opposed the proposed sale thereby signaling their desire for Mr. Small to remain the owner of his FM station in Milledgeville, GA.

10) In a jointly tiled *Petition for Reconsideration*, WNNX and Sapphire Broadcasting, Inc.,[2] and in a reply tiled by WNNX, WNNX and Sapphire protested Mr. Small's effort to sell his radio station under File No, BALH-96122361; at least as of April-May 1997 WNNX and Bridge Capital Investors apparently preferred that Mr. Small remain the owner **of** Station WLRR(FM). Each pleading was signed by counsel representing WNNX in the instant proceeding, Mr. Lipp. WNNX's counsel's statement in WNNX's November 8, 2002 *Consolidated* ***Opposition*** that "WNNX's counsel has played no role in any legal proceedings involving Small other to act as WNNX's counsel in this proceeding" is clearly false and misleading, and a blatant misrepresentation, because WNNX actually teamed up with Bridge Capital Investor's in 1997, in a proceeding before this Commission, to threaten civil action against Mr. Small based upon the very subject matter which serves as the basis of the suit Bridge Capital Investors tiled against Mr. Small in August 2002

11) Specifically, WNNX threatened that Mr. Small's activities before the Commission

> constitute a blatant violation of the agreement between Small and Emerald (and its successor, Sapphire) [aka Sapphire, **aka** Gammon, **aka** Bridge Capital Investors, aka Diversified, aka WNNX, aka Susquehanna Radio Corp.] which will trigger civil action for

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[2] WNNX and Bridge Capital Investors each claim to be a successor-in-interest to Sapphire Broadcasting, Inc. *See* attached *Order*, at 2-3 (Bridge Capital Investors acquires all of the shares of Sapphire Broadcasting, Inc.); *see also* WNNX's May 27, 1997 *Reply to Opposition to Petition for Reconsiderution*, File No. BALH961223GI, at 1 (WNNX admits that it is the "successor-in-interest to Sapphire Broadcasting, Inc.").

> specific performance and damages . . . the damages will range upward from Ten Million Dollars.

WNNX's April 30, 1997 *Petition for Reconsiderution*, File No. BALH-961223GI, at *6*. Because the Commission does not adjudicate claims for contractual damages, the only purpose served by WNNX's threat of severe civil liability was to intimidate Mr. Small to dissuade him from proceeding to assert his rights before the Commission in clear violation of the Commission's anti-tampering rule.

12) Mr. Lipp's statements that "WNNX states unequivocally that it is not a party to or authorized any threats against Mr. Small" and [hat "WNNX's counsel has played no role in any legal proceedings involving Small other to act as WNNX's counsel in this proceeding" are demonstrably false and are intended to mislead the Commission on the issue of WNNX's involvement in making threats of civil liability against Mr. Small. Mr. Lipp and WNNX made the very same threat to Mr. Small in the Spring of 1997 which Mr. Gammon subsequentlymade to Mr. Small in the Spring of 2002. Given WNNX's own prior threat to sue Mr. Small concerning the 1990 agreement, the very agreement about which litigation was filed against Mr. Small in August 2002, given WNNX's counsel's false statement that WNNX has never threatened Mr. Small, given WNNX's threats of a libel suit against Mr. Small, given WNNX's undeniable interest to be rid of Mr. Small from this proceeding, given WNNX's admission that it is the successor-in-interest to the rights granted by the 1990 agreement, and given the frivolous nature of the suit brought against Mr. Small, a material question of fact exists regarding WNNX's role in the threats of civil litigation made against Mr. Small in the Spring of2002 which threats were intended to intimidate Mr. Small

from asserting his rights before the Commission in competition against WNNX's claims for the allocation.'

WHEREFORE, it is respectfully submitted that the Commission investigate whether WNNX and its counsel had any role in the civil threats made against Mr. Small or any role in the filing of the civil suit against Mr. Small

Respectfully submitted,
PRESTON W. SMALL

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December 13,2002

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[3] On December 10,2002, at the request of Cox Radio, Inc., the Commission held ameeting to discuss MM Docket 01-104. Counsel to Cox Radio inquired of the Chief of the Cornmission's broadcast policy and licensing division what action the Commission would take in the event that Mr. Small filed an appeal of MM Docket 98-1 12 with the Court of Appeals. The Chief appropriately responded that it was not the Commission's function to deny a person his statutory rights to appeal Commission orders to the appeals court. Because Cox'scomment was so far fetched, while showing the lengths Mr. Small's opponents will go to defeat his opportunity to assert his rights, the comment **had** to be memorialized in the record. In MM Docket 01-104, Mr. Small has argued the Cox, WNNX, and Radio South, Inc. have illegally conspired to deny Mr. Small his right to assert his position in MM Docket 98-1 12 before the Commission. The companies on the other side obviously feel that they can make whatever assertions they desire without consequence. However, Mr. Small hasdefended himselfagainsta wholly frivolous civil suit and he will continue to protect his interests.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Filed at 2:30 P M
DATE 11-26-02
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

BRIDGE CAPITAL INVESTORS II,

Plaintiff,

v.

Civil Action No.
3:02-CV-80 (HL)

PRESTON W. SMALL,

Defendant.

ORDER

Plaintiff, Bridge Capital Investors II ("BCI"), filed suit in this Court on August 15, 2002 alleging breach of contract.[1] On August 27, 2002, BCI filed a Motion for a Preliminary Injunction (Tab #2) asking the Court to prevent Defendant, Mr. Preslon Small, from further interfering with the issuance of a final order from the FCC. On September 9, 2002, Defendant filed a Motion to Dismiss (Tab #8). Both motions are before the Court. On October 25, 2002, this Court held a hearing on the outstanding motions. For the following reasons, both motions are denied.

I. BACKGROUND

In February 1990, Emerald Broadcasting of the South, Inc. ("Emerald"), BCI's predecessor in interest, was attempting to obtain a construction permit and move its radio station, WWWQ(FM) (formerly WHMA(FM)) (the "Station"), from Anniston, Alabama to provide service to an unserved or underserved community in northwestern Georgia (the "Relocation Plans"). At that time, Mr. Small had filed papers with the Federal Communications Commission ("FCC") seeking to upgrade and relocate

[1] BCI has had numerous predecessors in interest. For purposes of this Order, "Plaintiff" stands for BCI or one of its predecessors in interest.

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his radio station, WPWS(FM) ("Mr. Small's station'?, from Milledgeville to Covington, Georgia. The site preference, construction **permit, and** allocation proposal for Mr. Small's station **directly** conflicted **with** Emerald's Relocation Plans.

On February 12,1990, Mr. Small entered into the "Small Agreement" with Emerald and Crown Broadcasting ("Crown"), which were two companies wholly owned by Mr. Thomas P. Gammon. Mr.

> [T]hat neither **he** nor any of his partners, agents, or employees will fila or assist in, suggesf or otherwise encourage the filing of, any Petition for Rule Making, Counterproposal or any **other** pleading, application, or amendment to any pleading or application before **the** Commission *or* any other forum, or engage in **any** other conduct which would in any manner interfere or conflict with or delay the Relocation Plans.

Gammon ***did*** not hold any interest in the person or entity to whom the Station was sold. (Small **Agreement** ¶ *6.2.)*

filed Comments and Counterproposals with the FCC to relocate the Station from Anniston, Alabama

On **January** 3, 1991, Emerald merged with Sapphire Broadcasting, Inc. The name of the surviving corporation **was** "Emerald Broadcasting of the South, Inc." Later that day, the name of the corporation **was** changed to **"Sapphire** Broadcasting, Inc." ("Sapphire"). (Goodrich Aff. 2 Ex. C.)

On June 7, 1991, Mr. Gammon, the **sole** stockholder of Sapphire, pledged **all** of his shares of

Sapphire to BCI. On **July** 1, 1992, in **an** "Agreement to Sell Stock and Release Collateral" by Mr.

assignee, subject to approval of the FCC (which **was** later **granted** on October **26, 1992).**

On May 12,1994, Mr. Gammon entered into **a** "Participation Agreement" **and** transferred his **Sapphire** stock as he had committed to do. On June **20,1994,** Sapphire filed Ownership Report Form 323 **with** the FCC, the form provided that **as** of May 12,1994, BCI and Mr. Gammon had consummated.

that Sapphire would transfer the FCC authorization for the Station **and** other assets of Sapphire to Susquehanna. The Susquehanna Agreement closed on May **22,** 1997, **with** the transfer of assets occurring on that date. The Susquehanna Agreement provides that Sapphire has the right to receive *an* additional payment from Susquehanna if the FCC grants a construction permit for the Station without **any** "material adverse conditions," and the construction permit becomes a **"Final** Order,"' within six

> to which the ***time*** for **filing** any such request, or for the FCC to **set** aside its order on its own motion, has **expired.**

(Susquehanna Agreement ¶ **5.4(a)).**

was May 22, 1997, Sapphire's right to receive the $10-20 million payment expires on May 21, 2003.

On June 11, 1997, Mr. Hoyt J. Goodrich, as President of Sapphire, assigned, transferred and set over all of Sapphire's rights and other interests in the $10-20 million payment to BCI. The assignment provides that BCI is to remit 1% of the payment to Sapphire if received. (Goodrich Aff. 1 Ex. D.) At the same time, BCI, the owner of all of the issued and outstanding capital stock of Sapphire, sold the stock to Diversified Acquisition LLC ('Diversified'). Diversified dissolved Sapphire and retained its assets, including the Small Agreement and its right to receive 1% of the payment due under the Susquehanna Agreement. (Goodrich Aff. 1 ¶ 17.) Diversified subsequently assigned to BCI all of its rights under the Small Agreement.

As a result of these transactions, BCI currently owns all of Emerald's rights under the Small Agreement. BCI also owns the right to receive approximately 98% of the payment, while Diversified retains the right to receive approximately 2%. (Goodrich Aff. 1 ¶ 19.) Mr. Gammon retains an approximate 20% interest in the amount that Susquehanna would pay BCI. (Gammon Aff. ¶ 3.)

A. Filings with the FCC

As stated earlier, after entering the Small Agreement on February 12, 1990, Emerald filed Comments and Counterproposals with the FCC to relocate its Station from Anniston, Alabama to Sandy Springs, Georgia. At the same time, Mr. Small withdrew his proposal to relocate his Milledgeville station to Covington, Georgia.

On October 25, 1991, the FCC issued an order which denied Mr. Gammon's attempt to relocate the Station from Anniston to Sandy Springs. Sapphire timely filed a review petition with the FCC concerning the 1991 Report and Order, resulting in Sapphire's rulemaking proposal remaining active before the FCC. (Welch Aff. ¶ 17.) The FCC dismissed Sapphire's Application for Review on June

Review, which the FCC did on January 23,1998.

In December 1996, Mr. Small entered into an agreement to sell the assets of his station to Scotts Trail Radio, Inc. ("Scotts Trail Radio"). At or about that time, Scotts Trail Radio filed a Petition for Rule Making with the FCC to move Mr. Small's station from Milledgeville to Covington (the "Scotts. Trail Petition"). Though the FCC granted the application to assign the Milledgeville station from Mr.

After the potential sale fell through, on July 28, 1997, Mr. Small adopted the Scotts Trail Petition as his own and filed a Petition for Rule Making with the FCC. In this petition, Mr. Small specifically sought the same result that had been sought in the Scotts Trail Petition (moving Mr. Small's station from Milledgeville to Covington). On November 6, 1997, Susquehanna filed a new Petition for Rule Making, seeking to move the Station from Anniston, Alabama, to College Park, Georgia; this move would result in the Station serving the Relocation Market.

to move the Station from Anniston to College Park. (Goodrich Aff. 1 Ex. F.) On April 24, 2000, the FCC entered a Report and Order in favor of Susquehanna's petition; the FCC modified the license of become a Final Order until Mr. Small's Petition for Reconsideration is dismissed and the original grant

On February 7,2001, the FCC denied Mr. Small's June 16,2000 Petition for Reconsideration. Mr. Small responded on March 12,2001 by filing another Petition for Reconsideration. (Goodrich Aff. 1 **Ex.** H.) After Susquehanna **filed an** Opposition to Small's Petition for Reconsideration, Mr. Small filed **a** Reply to Susquehanna's Opposition. On November **2,** 2001, the FCC denied Mr. Small's Petition for Reconsideration.

On August 19, 2002 and August 22, 2002, Mr. Small filed another Petition for Reconsideration and a Motion to Open the Record. On September 3, 2002, Mr. Small filed an additional three documents.

In a letter dated August 28,2002, Susquehanna informed BCI that the pleadings filed with the FCC by Mr. Small on August 19,2002 and August 22,2002 prevent the July 25,2002 decision of the FCC from becoming a Final Order. (Letter from Bremer to Goldstein of 8/28/02.)

BCI contends Mr. Small's comments, replies, counterproposal, and petitions for reconsideration-all interfere, conflict with, and delay the Relocation Plans of the Station, and that each act constitutes a breach of the Small Agreement. Mr. Small is still filing with the FCC, and it is these filings that BCI wishes the Court to enjoin.

B. The Contract Provisions at Issue

Before the Court are various contracts entered into by the parties, their predecessors in interest, as well as non-parties. The Small Agreement, entered into by Emerald, Crown, and Mr. Small on February 12, 1990, and the Participation Agreement, entered into by Sapphire, *Crown,* BCI, various Purchasers, and Mr. Gammon on May 12,1994, are integral in the determination of the issue before the Court. Both agreements contain provisions that are subject to contrary interpretations. The provision at issue in the Small Agreement is paragraph 6.2, titled "Success."

> On the earlier of (i) six (6) months after the date the grant to Emerald of a construction permit which authorizes facilities for WHMA or an Affiliated Station (as defined below) with a transmitter site that is closer to the Alabama/Georgia boarder, or beyond that boarder, than its current site (or an authorization for increased power that would accomplish a similar result) becomes a Final Order (as defined below) or (ii) within twenty (20) days *after the* day Emerald begins program tests pursuant to such a permit, Emerald will pay Small One Million Dollars ($1,000,000.00) in cash by wire transfer or certified check; provided, however, that if (x) Emerald assigns the License for WHMA or transfers control of Emerald to a person or entity in which none of Crown or Gammon, or in the case of an assignment, Emerald, hold any interest (an "Assignment") and (y) on the date of the consummation of the Assignment there is pending before the

> Commission a rulemaking proposal and/or an application that if adopted and/or granted would permit WHMA to provide the service contemplated by this subsection, Emerald shall pay to Small One Million Dollars ($1,000,000.00) on or before the consummation of the Assignment; provided further, that if no such proposal or application is pending, no amount shall thereafter become due under this section and Small may modify WPWS at his leisure. Affiliated Station means a station in which Emerald, Crown or Gammon have a direct or indirect ownership interest or the owners of which have entered into an agreement with Emerald, Crown or Gammon, or any entity of which Emerald, Crow, or Gammon have an indirect or direct ownership interest, whereby anyone or all benefit from the provisions of this Agracmcnt. Final Order means an order or action that, by expiration of time or otherwise is no longer subject to judicial or administrative review or reconsideration.

(Small Agreement ¶ 6.2.)

The provisions at issue in the Participation Agreement all relate to paragraph six of the agreement, which provides, in part, that "if Sapphire distributes Capital Gains to Bridge Capital and the Purchasers, then Crown, or Gammon as a permitted assignee of Crown shall be entitled . . . to a distribution of 20% of the total amount of Capital Gains to be distributed." (Participation Agreement ¶ 6.) The agreement defines "Capital Gains" as "the Net Proceeds received from any sale or disposition of any one or more of the Stations, less the amount of any Investment or any Additional Investment." (Participation Agreement ¶ 5(a)).

II. ANALYSIS

A. Defendant's Motion to Dismiss

Defendant puts forth two arguments in support of his Motion to Dismiss. First, Defendant contends that the $75,000 amount in controversy requirement is not met because the value of the amount in controversy in this litigation is contingent on other proceedings and therefore is too remote and speculative to be "in controversy" withing the scope of diversity jurisdiction. Second, Defendant refers to Federal Rule of Civil Procedure 12(b)(7) and argues that BCI's claim is subject to dismissal for "failure to join a party under Rule 19," since BCI has not joined Susquehanna as a *party.*

1. Amount *in* **Controversy**

Because BCI seeks injunctive relief, "it is well established that the amount in controversy is measured by the value of the object of the litigation." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333,345 (1977); *see also* Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elec., Inc., 120 F.3d 216, 218 (11th Cir. 1997). "In other words, the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted."

218-20). In the Eleventh Circuit, in determining the amount in controversy, courts are to measure the value of the object of the litigation from the plaintiff's perspective. Ericsson, 120 F.3d at 219.

Courts have an obligation "to insure that the benefits resulting from an injunction *are* not

"Jurisdiction is to be tested by the value of the right sought to be protected against interference." Seaboard Fin. Co. v. Martin, 244 F.2d 329, 331 (5th Cir. 1957) (citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 181 (1936)). Here, BCI values its right to prevent Mr. Small from interfering with the Relocation Plans as worth $10-20 million. While the $10-20 million payment will not come from Mr. Small and is the result of another agreement, the Court does not construe BCI's valuation of its claim as contingent. Once Mr. Small stops filing with the FCC, the Order becomes a Final Order, and at that time, Susquehanna appears bound to BCI by an actionable obligation of $10-20 million. BCI has convinced the Court that its right to enforce the Small Agreement is measurable, and the benefit BCI will receive if Mr. Small stops filing with the FCC would satisfy the amount in controversy requirement. Therefore, the Court denies Defendant's Motion to Dismiss with respect to its argument on the value of the amount in controversy.

2. **Susquebanoa's Interests**

If BCI prevails in this litigation with enough rime for the construction permit to become a Final Order by May 21,2003, then – according to BCI and Mr. Small's interpretation of the Susquehanna Agreement – Susquehanna will have to pay $10-20 million to BCI. Mr. Small argues that Susquehanna has an "interest" in the outcome of the dispute; however, while Susquehanna likely prefers for this Court to rule so that it will not have to make the multimillion dollar payment to BCI, this "interest" of Susquehanna is not grounds for the Court to dismiss the action due to Susquehanna not being a party in this case. Any potential payment from Susquehanna to BCI will not be a result of this litigation. The payment is a result of a separate agreement between Susquehanna and BCI's predecessor in interest.

This Court will ultimately determine the validity of the Small Agreement and the effect of the actions of *Mr.* Small and BCI (and BCI's predecessors in interest) as they relate to the Small

Agreement. This is a breach of contract issue. As Susquehanna was neither a party nor a beneficiary to the contract, the Court does not believe that this case must be dismissed due to Susquehanna not being a party in this suit. Therefore, Defendant's Motion to Dismiss is denied.

B. Plaintiff's Motion for a Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites." Northeastern Fla. Chanter. of Ass'n of Gen. Contractors of Am. v. Jacksonville, Fla., 896 F.2d 1283, 1285 (11th Cir. 1990). In order to obtain a preliminary injunction, BCI, as the movant, must demonstrate: (I) a substantial likelihood of success on the merits, (2) a substantial threat that BCI will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to BCI outweighs the harm an injunction may cause Mr. Small, and (4) the preliminary injunction is in the public interest See Nnadi v. Richter, 976 F.2d 682, 690 (11th Cir. 1992); *see also* Fed. R. Civ. Pro 65. A preliminary injunction is an extreme remedy and should be granted only when all four elements are clearly established. Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001).

The purpose of the preliminary injunction is to preserve the status quo between the parties pending a final determination of the merits of the action. See Univ. of Tex. v. Camenisch, 451 U.S. 390,395 (1981) (purpose of a preliminary injunction is merely to preserve relative positions of parties until trial on merits can be held); Cate v. Oldham, 707 F.2d 1176,1185 (11th Cir. 1983) (maintenance of the status quo is the primary purpose of preliminary injunctive relief); Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567,573 (5th Cir. 1974) ("[T]he most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process *from* being rendered futile by defendant's action or refusal to act.").

Granting the preliminary injunction would not preserve the status quo in this case.) BCJ is not asking that the Court prevent Mr. Small from changing the existing situation to BCI's irreparable detriment. Instead, BCI asks that this Court enjoin and restrain Mr. Small from filing petitions with the FCC, which Mr. Small has been doing – with BCI's knowledge – since 1997, and possibly as early as December of 1996. This Court is not willing to enter an order, at the preliminary injunction stage, that would bar Mr. Small from engaging in the exact conduct that he has been actively and openly engaging. in for the last five years. Considering that Mr. Small only has a limited window of time to file objections to an FCC order, *see* 47 C.F.R. § 1.106(f) ("petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action . . ."), to stop Mr. Small from filing objections would result in *Mr.* Small losing his right to petition for reconsideration of the order with the FCC, as well as his right to appeal the FCC's ultimate decision with *the* court of appeals.[4] A preliminary injunction is supposed to preserve the court's power to render

[3] Tbe Court acknowledges that some courts have defined the status quo as "the last peaceable uncontested status" existing between the parties before the dispute developed. In those cases, courts employed this definition to award preliminary injunctions when it was necessary *to* compel the defendant to correct an injury already inflicted. Employing this standard of status quo "allows the court to restore the status quo ante when the continuation of *the* changed situation would inflict irreparable harm on plaintiff." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 (2d ed. 1995). Here, to return to the last peaceable uncontested status between the parties would result in returning to *the* status of the parties before Mr. Gammon entered into the Participation Agreement in May of 1994. Considering the length of time that has passed since May 1994, the actions taken by each party with the opposing party's knowledge, and the failure of either party to bring suit until now, a return to the status of the parties held in 1994 is unreasonable.

[4] "Section 405 of the Communications Act codifies the exhaustion of administrative remedies doctrine, which requires those challenging the Commission's actions to give the FCC a fair opportunity to pass on a legal or factual argument" Busse Broad. Corp. v. F.C.C., 87 F.3d 1456, 1460 (D.C. Cir. 1996) (citations and quotation omitted). Once the proceedings before the FCC conclude, a party aggrieved by an FCC order has sixty days from the "entry" of the order to file a petition for review in the court of appeals. 28 U.S.C.A. § 2344.

a meaningful decision after a trial on the merits. Here, the effect of granting the preliminary injunction would be the same as making a final ruling in this case, for once the time for Mr. Small to file an objection with the FCC elapses, the FCC order would be a Final Order.

1. Likelihood of Success on the Merits

BCI alleges that Mr. Small's filings with the FCC constitute a breach of contract. Pursuant to the Small Agreement, Mr. Small was paid $2 million in exchange for his express agreement to "eliminate any conflict with the Relocation Plans."

a. Mr. Small's actions that Plaintiff alleges violate the Small Agreement:

Mr. Small has acted contrary to the Small Agreement since 1997, and possibly since 1996. In December 1996, Mr. Small entered into an agreement to sell the assets of his station to Scotts Trail Radio. BCI contends that Mr. Small was trying to get Scotts Trail Radio to buy Mr. Small's station and move it to the Relocation Market (Compl. ¶ 26.) At or about that time, Scotts Trail Radio filed a Petition for Rule Making with the FCC to move Mr. Small's station from Milledgeville to Covington. This relocation would have resulted in Mr. Small's station serving the Relocation Market. Though the sale between Mr. Small and Scotts Trail Radio never closed, BCI contends that it shows Mr. Small breaching the Small Agreement as early as 1996. (Goodrich Aff. 1 ¶ 20.)

In 1997, Mr. Small began filing petitions with the FCC in an effort to relocate his station from Milledgeville to Covington and later to Social Circle, Georgia. If the Small Agreement was still in force, the filings violated the Small Agreement, for Mr. Small had agreed not to interfere or delay the Relocation Plans. Mr. Small submitted an affidavit of his FCC counsel, Mr. Timothy Welch, in which Mr. Welch explains Mr. Small's actions. The affidavit provides that after Mr. Small's sale transaction with Scotts Trail Radio fell through and Mr. Small had not received his $1 million payment either in

1994 when Mr. Gammon transferred control of the Station to BCI or in 1997 when Sapphire assigned the Station to Susquehanna, Mr. Small decided that he would file a rulemaking petition in his own name to improve his Milledgeville radio station. (Welch Aff. ¶ 33.)

BCI contends that *Mr.* Small's comments, replies, counterproposal, and petitions for reconsideration all interfere, conflict with, and delay the Relocation Plans of *the* Station, and that each act by Mr. Small constitutes a breach of the Small Agreement. The evidence before the Court indicates Mr. Small has acted contrary to the Small Agreement. However, the record also indicates that Mr. Small may have had reason to believe his actions were permissible, for BCI (and BCI's predecessors in interest) also engaged in acts that were contrary to the Small Agreement.

b. Actions that indicate Plaintiff is also in breach or that Mr. Small has reason to believe he can act contrary to the Small Agreement:

i. The Effect of the Participation Agreement on Mr. Gammon's "interest" in BCI.

As stated earlier, the Small Agreement provides that if "Emerald **assigns** the license for WHMA or transfers control of Emerald to aperson or entity in which none of Crown or Gammon, or in the case of an assignment, Emerald, hold **any** interest . . . Emerald shall pay to Small One Million Dollars ($1,000,000.00) on or before the consummation of the Assignment." (Small Agreement ¶ 6.2.)

On May 12, 1994, Mr. Gammon entered into the Participation Agreement, resulting in Mr. Gammon transferring his shares of Sapphire to BCI. The Agreement provided for Mr. Gammon to receive a "distribution of **20%** of the total amount of Capital Gains to be distributed" if "Sapphire distributes Capital Gains to Bridge Capital and the Purchasers." (Participation Agreement ¶ 6.)

BCI contends that because of Mr. Gammon's entitlement to 20% of the total amount of Capital Gains, Mr. Gammon still had an "interest," and therefore, the May 12,1994 transaction did not trigger the $1 million payment set forth in paragraph 6.2 of the Small Agreement. (Goodrich Aff. 2 ¶ 8 & Ex. D.) Both parties submitted letters to the Court in which they set forth their respective interpretations of "interest," as used in paragraph 6.2 of the Small Agreement. BCI contends that the meaning of interest encompasses a right to profits or proceeds, while Mr. Small argues that it refers to an ownership interest instead of a creditor's interest. Both parties have effectively argued their positions with respect to how this term should be defined. However, upon reviewing the record, the Court finds it is able to rule on this motion without addressing this issue. Thus, the intended definition of interest, as used in paragraph 6.2 of the Small Agreement, remains unresolved.

ii. Actions by Plaintiff and Defendant that weigh against this Court granting Plaintiff's preliminary injunction.

In support of his argument that the May 12, 1994 transfer of stock in Sapphire from Mr. Gammon to BCI triggered the $1 million payment, Mr. Small refers to the affidavit of his FCC counsel, Mr. Timothy E. Welch. The affidavit provides that shortly before the closing date of the Participation Agreement, Mr. Gammon contacted Mr. Welch seeking relief from the $1 million payment obligation that Mr. Gammon acknowledged would be due to Mr. Small. Mr. Gammon informed Mr. Welch that he was close to filing bankruptcy and that he had no money to pay Mr. Small upon divestiture of his interest in the Station. Mr. Gammon offered a 520,000 payment in lieu of the $1 million. Mr. Welch rejected Mr. Gammon's offer and indicated that the $1 million payment would be owed upon consummation of Mr. Gammon's transfer of stock. (Welch Aff. ¶ 21.) However, the payment was never made.

On June 20, 1994, Sapphire filed an "Ownership Report Form 323" with the FCC; the form provided that as of May 12, 1994, Mr. Gammon had completely divested his interest in Sapphire and the Station to BCI. (Welch Aff. Ex. H.) Defendant contends that as a result of the May 12, 1994 transaction, Mr. Gammon no longer had an interest in the Station and the $1 million payment obligation was triggered (Welch Aff. ¶ 22.)

On April 28, 1997, Mollie Fleeman Engle, civil counsel for Mr. Small, sent a letter to Sapphire's President, Mr. Hoyt Goodrich. In the letter, Mr. Small demanded payment under paragraph 6.2 of the Small Agreement. (Welch Aff. ¶ 30 & Ex. K.) A few weeks later, on May 12, 1997, Larry Engle, civil. counsel for Mr. Small, faxed a memorandum to Mr. Goodrich that explained the procedures to be employed for Sapphire to fulfill its $1 million payment obligation. (Welch Aff. ¶ 30 & Ex. L.)

Shortly before April 30, 1997, Mr. Welch was contacted separately by Mr. Gammon and Mr. Alan Moskowitz, Sapphire's FCC counsel. Upon demanding payment of the $1 million, Mr. Welch was told that the payment would not be made. (Welch Aff. ¶ 30.)

After the FCC granted Mr. Small's application to assign Mr. Small's station to Scotts Trail Radio, Sapphire and Susquehanna protested the grant by filing a Petition for Reconsideration with the FCC on April 30, 1997. In the petition, they *argued that* the FCC should not permit Mr. Small to sell his station. The petition provides that Scotts Trail Radio's filings constitute a blatant violation of the Small Agreement that will trigger civil action for specific performance and damages. (Welch Aff. ¶ 31 & Ex. M.) Despite stating that the filings triggered a civil action, no civil action was brought against Mr. Small until now. In another *filing* with the FCC, a Reply to Opposition to Petition for Reconsideration that opposed Mr. Small's proposed 1997 sale, Sapphire and Susquehanna filed a declaration of one of Sapphire's attorneys, Mr. Allan Moskowitz. In the declaration dated May 27, 1997, Mr. Moskowitz states that the Small Agreement could be interpreted to have expired. (Moskowitz Decl. ¶ 5.)

On May 22, 1997, Sapphire and Susquehanna closed on its agreement known as the Susquehanna Agreement; at this time, a transfer of assets between the parties occurred. In its November 1,2002 letter to this Court, BCI's counsel states "Small did not have a basis to claim aright to receive $1 million under the Small Agreement until the Susquehanna deal became effective in May 1997." (Letter from Brickell to Judge Lawson of 11/1/02, at 4.) Thus, BCI indicates that the sale to Susquehanna resulted in Mr. Small having a basis to claim that paragraph 6.2 of the Small Agreement-had been triggered thereby entitling Mr. Small to payment of $1 million. BCI now admits Mr. Small had a basis for claiming the $1 million after 1997, yet BCI (and its predecessors in interest) repeatedly denied Mr. Small's requests for payment in 1994, four times in 1997, and in 2000.[5]

On May 19, 2000, Bob Thorburn, media broker for Mr. Small, sent a letter lo Susquehanna requesting the $1 million payment. On May 22,2000, W. Edwin Jackson, counsel for Susquehanna, responded by letter to Bob Thorbum, denying Mr. Small's request. (Letter from Jackson to Thorbum of 5/22/00.) Upon receiving notice of Mr. Thorburn's letter, Ira J. Goldstein, BCI's counsel, also replied to Mr. Thorburn. Mr. Goldstein's letter provided that commencement of an action against Susquehanna would be an abuse of process as well as frivolous. The letter also stated that Sapphire "was dissolved and liquidated years ago." (Letter from Goldstein to Thorbum of 5/30/00.)

c. **Laches**

Mr. Small $1 million as a result of the transfer of assets that occurred between Sapphire and Susquehanna – or as a result of the transfer from Mr. Gammon to BCI in the May 12, 1994 Participation Agreement – did this obligation transfer to Diversified, and if so, was it assigned to BCI when Diversified assigned "its rights under the Small Agreement" to *BCI?*

Specific performance is an equitable remedy subject to equitable defenses. A chief remedial defense to an equitable claim is "laches." The laches defense arises when a party delays in bringing an equitable action, and the delay prejudices the defendant.

The Georgia Supreme Court has set forth various factors to consider in determining whether laches has occurred:

> [V]arious things are to be considered, notably the duration of the delay in asserting the claim, and the sufficiency of the excuse offered in extenuation thereof, whether during the delay the evidence of the matters in dispute has been lost or become obscure, whether plaintiff or defendant was in possession of the property in suit during the delay, whether the party charged with laches had an opportunity to have acted sooner, and whether the party charged with laches acted at the first possible opportunity.

Chapman v. McClelland, 286 S.E.2d 290,292 (Ga. 1982). Plaintiff indicated in its filings with the FCC that Mr. Small's conduct triggered a civil action as early as 1997, yet Plaintiff did not bring suit until August 15,2002. In its filings with this Court, BCI stated that it had no reason to commence an action prior to Susquehanna receiving the construction permit since "either Susquehanna or Small could have gotten a construction permit." (Goodrich *Aff.* 2 ¶ 12.) This statement contradicts BCI's argument that it has the right to enforce the Small Agreement as a result of Diversified assigning to BCI all of its rights under the Small Agreement on June 11, 1997. These rights existed prior to the FCC awarding Susquehanna a construction permit in November 2000 and appear unrelated to BCI's right to payment, which came from Sapphire. BCI held the right to ensure that Mr. Small did not interfere with the Station's Relocation Plans. Since BCI was aware that Mr. Small's filings interfered with the Relocation Plans, BCI had a reason to bring action against Mr. Small before now. Further, even if BCI believed it did not have reason to bring suit prior to November 2000, BCI still waited over eighteen months after the construction permit was granted *to* file suit.

d. **Conclusion with respect to substantial likelihood of prevailing on the merits:**

Upon reviewing the actions of both parties, the Court is not convinced that BCI has met its burden of demonstrating a substantial likelihood of success on the merits. The record before the Court indicates that Plaintiff may have breached the Small Agreement before Mr. Small. For example, the statement from Mr. Gammon to Mr. Welch in 1994 indicates that Mr. Gammon – who was the sole

$1 million payment was due to Mr. Small but would not be paid. In addition, the declaration of Allan

that it has a substantial likelihood of success on the merits.

2. A Substantial Threat that BCI Will Suffer Irreparable Harm

$10 to $20 million against Small." (Mem. Supp. Pl.'s Mot. for Prelim. Inj. at 11.) BCI argues that this "threat" results in an urgent situation calling for the Court to enjoin Mr. Small from filing with the FCC before the six-year period set forth in the Susquehanna Agreement elapses, so that BCI can have the possibility of recovery from Susquehanna

BCI refers the Court to cases of various courts which have found that a party will suffer irreparable harm because the opposing party would be unable to pay damages. (Mem. Supp. Pl.'s Mot. for Prelim. Inj. at 10.) However, in those cases, it was the opposing party who owed – or who would owe – the plaintiff money. Here, the circumstances are different; BCI is not seeking payment from Mr. Small. The potential multimillion dollar payment is a result of a subsequent agreement that Plaintiff entered into with a third-party, unrelated to Mr. Small.

The Court cannot overlook that prior to the closing date of the Susquehanna Agreement, Plaintiff was aware that Mr. Small had tried to sell his station, a Motion to Dismiss Application for Review had been filed with respect *to* Sapphire's Application for Review of the FCC's 1991 Order, and Mr. Small had made demands for the $1 million payment. In addition, the record indicates Plaintiff was well aware of Mr. Small's actions, for on April 30, 1997, Plaintiff and Susquehanna filed a petition for reconsideration with the FCC in which they contended that Scotts Trail Radio's filings constituted a "blatant violation" of the Small Agreement that triggered a civil action for specific performance and damages. (Welch Aff. *Ex*, M.) Thus, the record shows that when Plaintiff entered into the Susquehanna Agreement with its six-year term, Plaintiff knew that Mr. Small had violated the Small Agreement. "[I]t is quite clear that Mr. Small was breaching the Small Agreement well before Susquehanna bought the Station." (Compl. ¶ 27.) Considering that Plaintiff knew Mr. Small was violating the Small Agreement prior to entering the Susquehanna Agreement, and these violations *are* what delay a Final Order, the Court finds that Plaintiff's "irreparable harm" and the importance of the approaching end of the six-year term has been undermined.

3. **Balance of *the* Harms**

BCI contends that it faces the threat of missing the deadline for receiving the $10-20 million payment, while if an injunction were issued, Mr. Small would merely have to comply with the terms of the Small Agreement. Considering that Mr. Small has been acting contrary to the terms of the Small Agreement for more than five years and to enjoin him from filing with the FCC would deprive him of further appealing the FCC's Order with the FCC as well as with the court of appeals, the Court considers Mr. Small to have more of a "harm" than BCI contends.

The record before the Court indicates *that* Mr. Small continues filing with the FCC in hope that the FCC will allow him to move his station. Even BCI recognizes Mr. Small's goal:

> Mr. Small's meritless but clear goal then (and now), even though a Construction Permit to move to the Relocation Area has been issued to Susquehanna, and even though the Susquehanna Station has been built and is operating under the non-Final Construction Permit, is to delay or prevent the final relocation to College Park, Georgia in the hope that it will allow Mr. Small to move his station to the Relocation Market.

(Goodrich Aff. 1 ¶ 21.) No evidence is before the Court that Mr. Small is filing these petitions to deprive BCI of its potential multimillion dollar payment. Mr. Small has a goal of relocating his station, and even though this goal may be meritless, Mr. Small's actions over the past five years reflect his desired goal. The Court finds that depriving Mr. Small of this goal results in a valid harm that has not been outweighed.

4. Effect on the Public

BCI contends that "to countenance a breach of contract as egregious and material as Small's would clearly disserve the public." (Mem. Supp. Pl.'s Mot. for Prelim. Inj. at 11.) The Court disagrees. Assuming Mr. Small is in breach, the failure of Plaintiff to take any action to stop Mr. Small from engaging in the "egregious and material" breaches of the Small Agreement – which Mr. Small has continually "breached" since 1997 – indicates that permitting the alleged breach to continue, until this issue can be considered more thoroughly than by a preliminary injunction, will not "disserve" the public.

5. Conclnsion with respect to the preliminary injunction:

In its filings with the Court, BCI phrases its argument in terms of acting now or acting after May 2003. BCI fails to mention that it could have pursued its claim for breach of contract any time for the last five years. By waiting until August 2002 to sue Mr. Small, BCI let a situation fester for more than five years. BCI did not file suit until only nine months remained in the six-year time period set forth in the Susquehanna Agreement. With this short time remaining, BCI came to court and filed a preliminary injunction, urging the Court for expeditious relief. While this Court will happily work with the parties to expedite this case, the Court denies BCI's request for a preliminary injunction.

III. CONCLUSION

For the reasons discussed above, Plaintiff's Motion for a Preliminary Injunction (Tab #2) and Defendant's Motion to Dismiss (Tab #8) are hereby **DENIED.**

SO **ORDERED,** this the 25 day of November, 2002.

ENTERED ON DOCKET
11/27, 2002
Gregory J. Leonard, Clerk
Deputy Clerk

HUGH LAWSON, Judge

sjw

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of December 2002 served a copy of the foregoing FOURTH MOTION FOR LEAVE TO FILE SUPPLEMENT by First-Class United States mail, postage prepaid, upon the following:

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